In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-878

EXECUTIVE JET AVIATION, INC., et al.,
Petitioners,

v.

CITY OF CLEVELAND, OHIO, et al.,
Respondents.

BRIEF OF RESPONDENTS CITY OF CLEVELAND, OHIO AND PHILIP A. SCHWETZ OPPOSING CERTIORARI

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TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases.

Statutes.

Other.

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QUESTION PRESENTED.

Petitioners' statement of the question presented does not fairly reflect any question presented by the record in this case. The only question which would be presented if certiorari were granted herein is—

> Whether the court of appeals correctly held the action not cognizable in admiralty when it found on the undisputed evidence (as did the district court) that the alleged tort did not occur on navigable waters since the impact which precipitated the accident and resulting damage to petitioners' aircraft occurred when it was struck by a large number of birds while over the runway, disabling the plane's engines and causing it to lose altitude so as to strike a pick-up truck and the airport perimeter fence before coming to rest in navigable waters.

STATEMENT OF THE CASE.

This action arises out of the crash of a jet aircraft owned by petitioner Executive Jet Sales, Inc. and operated by petitioner Executive Jet Aviation, Inc. The crash occurred on July 28, 1968 as the plane was taking off from Burke Lakefront Airport in Cleveland, Ohio, adjacent to the navigable waters of Lake Erie.

As petitioners' aircraft taxied out to the runway for take off, respondent Dicken, the air traffic controller in the airport control tower, warned the pilots by radio, "Caution, birds on end of runway." (R. 19.[1]) "It looks like there are a million of them." (R. 65, 70, 71, 72.)

Ignoring that warning, the pilots commenced their take off and continued until the plane was rotated at a speed of approximately 125 knots (R. 19)—i.e., the nose was rotated upward so the plane would become airborne. At that point "a sea of birds on the runway became visible" to the pilots. (*Ibid.*)

As the plane approached the birds at an altitude of approximately 75 feet above the runway, it "caused them to flush and fly into the aircraft, apparently hundreds hitting the belly and engine intakes." (R. 19.) "*There was almost immediate total loss of power.*" (*Ibid.*) The total loss of engine power was due to extensive damage to both jet engines resulting from the bird strike and the fact that both engines were filled with bird debris, all as described in detail by McAvoy, the chief investigator of the accident for the National Transportation Safety Board. (R. 59-60.)

Upon sustaining the total power loss the plane descended in a semi-stalled attitude until it struck the top of

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[1] Record references (R. ___) are to pages of the printed Appendix to the Briefs, and references (Ph. ___) are to the Appendix of Photographic Exhibits both of which were filed in the court of appeals and transmitted as the record in this Court.

a pick-up truck parked at the end of the runway and the airport perimeter fence. (R. 19, 52, 56.) The point where the aircraft struck the truck and fence is marked on Plaintiffs' Exhibit 4 (Ph. 2) and the damage to the truck and fence is shown in Plaintiffs' Exhibits 37 and 42. (*Id.* 4, 5.)

After striking the fence the plane continued on until it landed in the water. (R. 19.) The distance from the fence to the point where the plane came to rest was approximately one-fifth of a statute mile (R. 43-4), but was quite close to the edge of the land which extended beyond the end of the runway as marked by McAvoy on the map of the airport, Plaintiffs' Exhibit 4. (Ph. 2.) The plane floated approximately 5 to 10 minutes before it sank. (R. 20.) "The crew returned to the airport and there were no injuries." (*Ibid.*)

District Court Held Action Not Cognizable in Admiralty Because Tort Occurred Over Land and There Was No Maritime Nexus.

The district court in its memorandum opinion set out the pertinent facts, noting that "[t]here is no genuine issue as to any of the facts set out above." (Pet. for Cert. 31a.) Based on these facts the district court found that "it is manifest that the alleged negligence became operative upon the aircraft while it was over the land." (*Id.* at 36a.) "Whether it came down upon land or upon water was largely fortuitous." (*Id.* at 37a.) The court concluded that "the undisputed facts in this case demonstrate that the tort occurred over the land." (*Id.* at 38a.) Hence, "the tort in this case did not occur upon navigable waters and the action is not cognizable in admiralty." (*Ibid.*)

The district court also found that "the operative facts of the claim in this case are concerned with the land-

connected aspects of air commerce, namely, the maintenance and operation of an airport located on the land and the dangers encountered by an aircraft when using its runways for take-off. It is the Court's opinion that there exists no relationship between the 'wrong' alleged in this case and some maritime service, navigation or commerce upon navigable waters." (*Id.* at 41a.)

There being no basis for federal jurisdiction other than in admiralty, and having found the case not cognizable in admiralty, the district court dismissed the action. Thereafter petitioners refiled the case in state court where it now pends.

Court of Appeals Affirmed on Ground Tort Occurred Over Land.

The Court of Appeals for the Sixth Circuit affirmed on the sole ground that "the alleged tort occurred on land, even though the plane fell into navigable waters shortly after take off from the airport, and that no right of action is cognizable in admiralty." (Pet. for Cert. 1a.) The appellate court did not reach the question of maritime nexus, saying (*Id.* at 6a):

> Since we agree with the District Court that the alleged tort in this case occurred on land before the aircraft reached Lake Erie, and since admiralty jurisdiction does not extend to torts committed on land, it is not necessary to consider the question of maritime relationship or nexus discussed by this court in *Gowdy v. U. S.*, 412 F.2d 525, 527-29 (6th Cir.), *cert. denied*, 396 U.S. 960, and *Chapman v. City of Gross Pointe Farms*, 385 F.2d 962, 966 (6th Cir.). *See Nacirema v. Johnson*, 396 U.S. 212, 215, n. 7; *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 58-60; *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727, 729-31 (6th Cir.).

REASONS FOR DENYING CERTIORARI.

I. In View of Undisputed Facts Showing that Tort Occurred Over Land, Judgment Below Does Not Conflict with Decisions in Other Circuits.

Petitioners contend that the judgment of the Sixth Circuit in this case is in conflict with the decision of the Third Circuit in *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963), *cert. denied*, 375 U.S. 940 (1963).

This is simply not true. On the facts before the court in *Weinstein* the crash there occurred on the navigable waters of Boston Harbor and the tort thus had a maritime situs. This is diametrically opposite to the facts here where the tort clearly occurred over land.

To appreciate fully the basis of the *Weinstein* decision it is necessary to review briefly the background of the case as disclosed by the record on file in the Third Circuit. The matter came before the district court on exceptions of defendant Eastern Air Lines to the Libel on the grounds that (Weinstein R. 31a):[2]

> The *facts averred in the Libel* do not constitute a cause of action against Eastern Air Lines, Inc., within the admiralty jurisdiction of this Court.

and

> This Court does not have jurisdiction in admiralty against Eastern Air Lines, Inc., by reason of *the allegations that the place of the crash was within the territorial waters of the Commonwealth of Massachusetts.*

It is thus apparent that the *only* facts before the district court and the court of appeals in *Weinstein* were the

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[2] References to the printed appendix in the *Weinstein* case on file in the United States Court of Appeals for the Third Circuit will be designated as (Weinstein R. ___ a).

allegations of the Libel. Paragraph 9 of the Libel alleged (Weinstein R. 5a):

> Shortly after the said aircraft had become airborne, following take-off from the said airport, by reason of the negligence of the respondents, and each of them, and by virtue of their respective breach of warranties said aircraft crashed into the navigable waters of Boston Harbor, causing libellant's decedent to suffer severe and disabling injuries resulting in his death.

Eastern admitted in its answer "that said aircraft crashed into an inlet or body of water on or about the date averred and that libellant's decedent was killed." (Weinstein R. 25a.)

The district court had before it only the allegation, admitted by Eastern, that the aircraft had crashed into the navigable waters of Boston Harbor causing decedent's death. Consequently court and counsel accepted the fact that the situs of the tort was on navigable waters and the only question presented for a decision by the district court was whether that fact alone was sufficient to confer admiralty jurisdiction on the court or whether it was also necessary to find a maritime nexus as a basis for admiralty jurisdiction.

The district court, after a careful review of the authorities, concluded that not only a maritime locality but "some maritime connection is necessary for admiralty jurisdiction." *Weinstein v. Eastern Airlines, Inc.*, 203 F. Supp. 430, 433 (E.D. Pa. 1962). Since the district court found no maritime nexus it sustained Eastern's exceptions and dismissed the Libel.

The Court of Appeals for the Third Circuit took a different view, however, and reversed the decision of the district court because (316 F.2d at 761):

> The critical factor in determining whether a tort claim comes within the broad statutory grant of admiralty

jurisdiction is the situs of the tort; i.e., the place where it happened. *If the tort occurred on navigable waters, the claim is one that lies within the jurisdiction of the courts of admiralty; nothing more is required.*

Petitioners contend that the actual facts in the Boston Harbor crash were similar to those in the present case and hence a conflict exists. Whether that is true or not is beside the point. The fact is that neither the district court nor the court of appeals in *Weinstein* had any facts of record other than the admitted allegation that after take off the plane crashed into the navigable waters of Boston Harbor—thus the location of the tort was maritime.

There is admittedly a conflict between the Third and Sixth Circuits as to the requirement of a maritime nexus. In *Weinstein* the Third Circuit held that a maritime location alone is sufficient to establish admiralty jurisdiction. "[N]othing more is required." (*Ibid.*) The Sixth Circuit, however, has held in other cases that in addition to a maritime situs there must be a maritime nexus; i.e., "A relationship must exist between the wrong and some maritime service, navigation or commerce on navigable waters." [3]

It may well be that this conflict is one which should be resolved by this Court. But it is clear that *this case* does *not* present a record on which the conflict can be decided. Thus—

If the tort here had occurred on navigable waters—
(Which it did *not* as both the district court and the court of appeals found on the undisputed facts)

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[3] Chapman v. City of Grosse Pointe Farms, 385 F.2d 962, 966 (6th Cir. 1967); Gowdy v. United States, 412 F.2d 525 (6th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969).

And *if* the court of appeals had held the case not cognizable in admiralty because of the lack of any maritime nexus—

> (Which it did *not* since the court did not even reach that question because of its finding that the tort occurred on land)

then surely the case would present a suitable vehicle on which this Court might resolve the conflict thus presented between the Third and Sixth Circuits if it wished to do so.

But that is not the case before the Court. The judgment of the Sixth Circuit here does *not* conflict with *Weinstein* or any other court of appeals decision.

Petitioners have cited a number of cases of aircraft crashes in navigable waters wherein the courts held them cognizable in admiralty, and have suggested to the Court that a conflict exists between such decisions and the results below.[4] Examination of these decisions, however, will disclose that in each case the tort occurred on or over navigable waters.

The cases cited by petitioners fall into two categories. First are those cases in which the court has adopted the "locality alone" test and held admiralty jurisdiction to rest on the sole fact that the tort occurred on navigable waters—not true in this case. Second are those cases arising under the Death on the High Seas Act (46 U.S.C. § 761) which by its very nature is not applicable in this case.

Petitioners contend that the decision of the Sixth Circuit in this case stands alone.[5] Quite the contrary—

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[4] Pet. for Cert. 22-3.

[5] Pet. for Cert. 23.

II. Judgment Below Is in Accordance with Settled Law as Announced by this Court.

It has long been held an essential requisite of admiralty jurisdiction that the tort occur on navigable waters. If the situs of the tort is on land there can be no admiralty jurisdiction. *Smith & Son v. Taylor,* 276 U.S. 179 (1928).

The essence of petitioners' contention here is that since their aircraft came to rest in navigable waters where the principal damage to the plane occurred, the location of the tort is maritime. However, that contention is completely refuted by this Court's decision in *Smith & Son v. Taylor,* 276 U.S. 179 (1928), where a longshoreman standing on the wharf (deemed to be an extension of land) was struck by a cargo sling and knocked into the water where he was later found dead. The issue before this Court was whether the rights of the parties were controlled by maritime law or state law. The contention of the plaintiff in error was summarized by the Court (*Id.* at 182):

> It argues that as no claim was made for injuries sustained while deceased was on land and as the suit was solely for death that occurred in the river, the case is exclusively within the admiralty jurisdiction.

Note that this is the very argument petitioners advance in the case at bar. They say that the suit is solely for the destruction of their aircraft which did not occur until it sank in navigable waters and hence the case is one in admiralty. This Court rejected that contention, however, pointing out that "this is a partial view that cannot be sustained." (*Ibid.*) The Court continued (*Ibid.*):

> The blow by the sling was what gave rise to the cause of action. *It was given and took effect while deceased was upon the land.* It was the sole, immediate and proximate cause of his death. The *G. R. Booth,* 171

U.S. 450, 460. *The substance and consummation of the occurrence which gave rise to the cause of action took place on land.*

In the present case it could likewise be said that the impact of the birds on the plane and its engines was "what gave rise to the cause of action." That event "took effect while [the plane] was upon the land. It was the sole, immediate and proximate cause of [the crash]. . . . The substance and consummation of the occurrence which gave rise to the cause of action took place on land." (*Ibid.*)

The converse of *Smith & Son* came before the Court in *Minnie v. Port Huron Co.*, 295 U.S. 647 (1935), where a longshoreman working on the deck of a vessel was struck by a swinging hoist and knocked onto the wharf. Observing that, "We had the converse case before us in *Smith & Son* . . ." (*Id.* at 648), the Court held the case cognizable in admiralty, because (*Id.* at 649):

> If, when the blow from a swinging crane knocks a longshoreman from the dock into the water, the cause of action arises on the land, it must follow, upon the same reasoning, that when he is struck upon the vessel and the blow throws him upon the dock the cause of action arises on the vessel.

Similarly, in *The Admiral Peoples*, 295 U.S. 649 (1935), a passenger fell from the ship's gangplank onto the wharf and was injured, it being alleged that the fall was caused by negligent construction or placing of the gangplank. This Court held that since the gangplank was part of the ship and the cause of action originated and the injury had commenced on the gangplank, the cause of action was in admiralty.

The court of appeals cited and relied on *Smith & Son*, *Minnie* and *Admiral Peoples* in deciding that the alleged tort here arose on land. In addition, Chief Judge Phillips,

speaking for the court, and Judge McCree in his concurring opinion cited and relied, as did the district court, on *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727 (6th Cir. 1965), *cert. denied*, 382 U.S. 812 (1965). In *Wiper* plaintiff's decedent was alleged to have fallen from a dock and drowned as the result of defendant's negligence in maintaining the dock. Holding that the tort was completed on land, the court observed that (*Id.* at 730):

> [T]he negligently maintained dock which presumably caused the decedent to fall was land, and the decedent was on land at the time he was caused to fall. Thus, the tort was complete before decedent ever touched the water and this being true, the subsequent drowning is significant not to determine the maritime or non-maritime nature of this action but only as it relates to damages.

In the present case the plane was over land when it was struck by the birds and caused to fall. The tort was thus complete before the plane ever touched the water. Its subsequent immersion "is significant not to determine the maritime or non-maritime nature of this action but only as it relates to damages." *(Ibid.)*

Judge McCree summed up the matter most succinctly in his concurring opinion, saying (Pet. for Cert. 7a):

> The rule, as I understand it, is that the situs of the tort is where the negligence becomes operative, not where the damages, or the major portion of them, are sustained. Applied here, this rule requires affirmance of Judge Kalbfleisch's careful opinion. The plane hit the gulls over land; and there, under our rule, is where the tort occurred.

We submit that the logic of this view is irrefutable, and accordingly—

III. Court of Appeals and District Court Correctly Held Case Not Cognizable in Admiralty.

Petitioners argue that the decision below was erroneous. They say the court of appeals should not have followed *Smith & Son, Minnie* and *Admiral Peoples* because the present case involves an airplane crash[6]—as though that were sufficient ground for ignoring the rulings of this Court. Petitioners contend that "the Sixth Circuit has fashioned a totally unworkable rule for future aircraft cases." [7]

On the contrary, the rule adopted by the court below is the only sensible way to deal with cases of this kind. Indeed, the approach urged by petitioners was sharply criticized by the American Law Institute, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969),[8] saying (*Id.* at 231):

> If a plane takes off from Boston's Logan Airport bound for Philadelphia, and crashes on takeoff, *it makes little sense that the next of kin of the passengers killed should be left to their usual remedies, ordinarily in state court, if the plane crashes on land, but that they have access to a federal court, and the distinctive substantive law of admiralty applies, if the wrecked plane ends up in the waters of Boston Harbor.* This result has been found to follow, however, from the rule that locality alone is enough to give jurisdiction in admiralty. *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963).

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[6] Pet. for Cert. 24.

[7] *Id.* at 25.

[8] In addition to a distinguished group of reporters and consultants, the advisory committee for the study included four United States Courts of Appeals judges—Judge Henry J. Friendly of the Second Circuit, Judge Albert B. Maris (Ret.) of the Third Circuit, Judge John Minor Wisdom of the Fifth Circuit and Judge Charles Merton Merrill of the Ninth Circuit.

Proposing an amendment to Judicial Code § 1333 which would require a maritime nexus as a requisite for admiralty jurisdiction, the Institute expressed the following conclusion (*Id.* at 233):

> Though the Reporters believed that the Supreme Court would hold that locality alone is not sufficient for admiralty jurisdiction, they thought that *the matter should be settled by statute. It is hard to think of any reason why access to federal court should be allowed without regard to amount in controversy or citizenship of the parties merely because of the fortuity that a tort occurred on navigable waters, rather than on other waters or on land.* . . . [The amendment] is intended to ensure that result, and to require that *some relationship be found between the wrong and some maritime service or navigation or commerce on navigable waters.*

Petitioners also suggest that the decision below is erroneous because the application of general federal maritime law in cases such as this would insure uniformity of decisions and uniformity of results.[9] This contention squarely conflicts with the express policy of Congress that the federal interest lies in the orderly and uniform regulation of *all* air commerce under the Federal Aviation Act of 1958 (49 U.S.C. §§ 1301-1542) and by the rules and regulations of the Civil Aeronautics Board and the Federal Aviation Administration made pursuant to that Act. Indeed, § 1509(a) of the Act specifically provides that laws of the United States relating to navigation and shipping, including the rules for prevention of collisions, shall not apply to aircraft, except as to international rules relating to navigation on the high seas as set forth in 33 U.S.C. §§ 143-147d. That exception is inapplicable here since 33 U.S.C. § 143 specifically provides that "Sections 144-147d

[9] Pet. for Cert. 21.

of this title shall not apply . . . to the Great Lakes of North America and their connecting and tributary waters . . . nor, with respect to aircraft, to any territorial waters of the United States."

If, as petitioners suggest, it is desirable to have a uniform law applicable to aircraft accidents, such a law should be enacted by Congress. It should apply to *all* aircraft accidents whether on land or sea. The piecemeal solution to the problem proposed by petitioners is neither desirable nor workable.

CONCLUSION.

The court of appeals correctly held that "the alleged tort occurred on land, even though the plane fell into navigable waters shortly after take off from the airport, and that no right of action is cognizable in admiralty." (Pet. for Cert. 1a.) That decision is in accordance with well settled law announced by this Court.

The decision below does not conflict with *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963). The court of appeals in the present case specifically noted (Pet. for Cert. 6a):

> As we read that [*Weinstein*] decision, the test for admiralty jurisdiction over torts stated at 316 F.2d at 761 produces the same result we have reached when applied to the facts of the present case. The Court said:
>
> "The critical factor in determining whether a tort claim comes within the broad statutory grant of admiralty jurisdiction is the situs of the tort; i.e., the place where it happened." *Id.* at 761.

In *Weinstein* the tort took place on the navigable waters of Boston Harbor. Here the alleged tort occurred over land. The different results are based on different facts.

The present case does not afford a vehicle for deciding the question whether a maritime nexus (in addition to a maritime location) is necessary for admiralty jurisdiction.

The petition for certiorari presents no substantial question for resolution by this Court.

The writ should be denied.

Respectfully submitted,

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